

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

CARLOS RICHARD LECROY,

Plaintiff

v.

VA SIERRA NEVADA HEALTH CARE  
SYSTEM,

Defendant

Case No.: 3:24-cv-00272-MMD-CSD

**Report & Recommendation of  
United States Magistrate Judge**

Re: ECF Nos. 1-1, 4

This Report and Recommendation is made to the Honorable Miranda M. Du, Chief United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Plaintiff initiated this action by filing a Claim for Damage, Injury, or Death on Standard Form 95 against the Department of Veterans Affairs (VA) Sierra Nevada Health Care System asserting a claim for medical malpractice under the Federal Tort Claims Act (FTCA). (ECF No. 1-1.)

The initiating documents were not accompanied by an application to proceed *in forma pauperis* (IFP) or the filing fee. The court gave Plaintiff 30 days to file a completed IFP application or pay the filing fee. (ECF No. 3.) On July 30, 2024, Plaintiff filed an IFP application. (ECF No. 4.)

**I. IFP APPLICATION**

A person may be granted permission to proceed IFP if the person “submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense

1 or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez*  
2 *v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that 28 U.S.C. § 1915 applies to  
3 all actions filed IFP, not just prisoner actions).

4 In addition, the Local Rules of Practice for the District of Nevada provide: "Any person  
5 who is unable to prepay the fees in a civil case may apply to the court for authority to proceed  
6 [IFP]. The application must be made on the form provided by the court and must include a  
7 financial affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

8 "[T]he supporting affidavits [must] state the facts as to [the] affiant's poverty with some  
9 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)  
10 (quotation marks and citation omitted). A litigant need not "be absolutely destitute to enjoy the  
11 benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

12 A review of the application to proceed IFP reveals Plaintiff cannot pay the filing fee;  
13 therefore, the application should be granted.

## 14 II. SCREENING

### 15 A. Standard

16 "[T]he court shall dismiss the case at any time if the court determines that-- (A) the  
17 allegation of poverty is untrue; or (B) the action or appeal-- (i) is frivolous or malicious; (ii) fails  
18 to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a  
19 defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

20 Dismissal of a complaint for failure to state a claim upon which relief may be granted is  
21 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii)  
22 tracks that language. As such, when reviewing the adequacy of a complaint under this statute, the  
23 court applies the same standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668

1 F.3d 1108, 1112 (9th Cir. 2012) (“The standard for determining whether a plaintiff has failed to  
2 state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the  
3 Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a claim.”). Review under  
4 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*,  
5 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

6 The court must accept as true the allegations, construe the pleadings in the light most  
7 favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*,  
8 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are “held to less  
9 stringent standards than formal pleadings drafted by lawyers[.]” *Hughes v. Rowe*, 449 U.S. 5, 9  
10 (1980) (internal quotation marks and citation omitted).

11 A complaint must contain more than a “formulaic recitation of the elements of a cause of  
12 action,” it must contain factual allegations sufficient to “raise a right to relief above the  
13 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading  
14 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]  
15 a legally cognizable right of action.” *Id.* (citation and quotation marks omitted). At a minimum, a  
16 plaintiff should include “enough facts to state a claim to relief that is plausible on its face.” *Id.* at  
17 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

18 A dismissal should not be without leave to amend unless it is clear from the face of the  
19 complaint that the action is frivolous and could not be amended to state a federal claim, or the  
20 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d  
21 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

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1 **B. Plaintiff's Initiating Documents**

2 Plaintiff seeks to assert a medical malpractice claim against the VA Sierra Nevada  
3 Healthcare System related to care he received in May 2023.

4 The FTCA provides a procedure for asserting claims against the United States for money  
5 damages for certain injuries, including personal injury, caused by the negligent or wrongful act  
6 or omission of an employee of the United States acting within the scope of his or her  
7 employment. A tort claim against the United States based on the negligent or wrongful act or  
8 omission of an employee of the Department of Veterans Affairs may be filed using Standard  
9 Form 95, Claim for Damage, Injury or Death. Plaintiff used the proper claim form. However,  
10 before proceeding before the United States District Court, Plaintiff is required to present his  
11 claim (within two years of the date the claim accrued) *to the proper agency*, here, the  
12 Department of Veterans Affairs. Only if the VA denies the administrative claim (or fails to make  
13 a decision on the claim after six months) may a veteran then file a lawsuit in federal court under  
14 the FTCA.

15 Therefore, Plaintiff's federal court action should be dismissed without prejudice so that  
16 he may pursue his administrative claim with the VA.

17 **III. RECOMMENDATION**

18 IT IS HEREBY RECOMMENDED that the District Judge enter an order:

19 (1) **GRANTING** Plaintiff's IFP application (ECF No. 4). Plaintiff is permitted to  
20 maintain this action without prepaying the filing fee.

21 (2) The initiating documents (ECF No. 1-1) should be **FILED**.

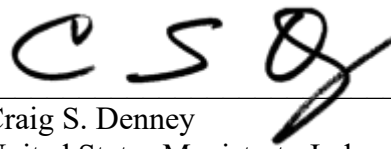
22 (3) The action should be **DISMISSED WITHOUT PREJUDICE** so Plaintiff can pursue  
23 his claim with the VA.

1 The Plaintiff should be aware of the following:

2 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to  
3 this Report and Recommendation within fourteen days of being served with a copy of the Report  
4 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s  
5 Report and Recommendation” and should be accompanied by points and authorities for  
6 consideration by the district judge.

7 2. That this Report and Recommendation is not an appealable order and that any notice of  
8 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed  
9 until entry of judgment by the district court.

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11 Dated: September 16, 2024

12   
13 Craig S. Denney  
14 United States Magistrate Judge  
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